No. 87-173

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OCTOBER TERM, 1987

MASSACHUSETTS MEDICAL SOCIETY,
AMERICAN MEDICAL ASSOCIATION, and
JOSEPH J. O'CONNOR, M.D.,
Petitioners,

v.

MICHAEL S. DUKAKIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONERS

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In holding that Chapter 475 is not preempted by the Medicare Act, the decision below directly conflicts with several decisions of this Court which have invalidated any state law that negates the exercise of an option *purposefully* created by Congress for the proper operation of a federal program. *See* Pet. 11. These decisions uniformly hold that a state law which eliminates such an option violates the Supremacy Clause—regardless of whether the federal law which establishes the option contains an explicit preemption clause and regardless of

whether it uses the word "right" or some other talismanic phrase. *Id.* at 12. Rather, because Congress has determined that giving regulated parties a specific option will promote the objectives of a federal program, states are not free to nullify that option.

In holding that an option created by Congress as part of a federal program has no preemptive force unless there is compelling, independent evidence that Congress "created or guaranteed . . . a right to be immune from state interference," Pet. App. 13a, the decision below undermines the Supremacy Clause jurisprudence of this Court. It calls into serious question the action that Congress must take to prevent states from nullifying options that it establishes for federal programs. And it directly negates the specific judgment of Congress that Medicare beneficiaries are best served when physicians are free to charge in excess of the amount reimbursed by the Department of Health and Human Services ("HHS"). For these and other reasons discussed in our petition, this case presents issues of national significance that are appropriate for review by this Court.

Respondents' effort to dissuade this Court from hearing this case is predicated on a distortion of the decision below and of the relevant provisions of the Medicare Act, 42 U.S.C. §§ 1395u(b)(3)(B) and 1395u(h)(1). Those provisions give physicians an option to bill Medicare patients more than the "reasonable charge" as determined by HHS. Respondents' Brief In Opposition, however, proceeds as if the Medicare Act does not give physicians this option. Respondents use their erroneous interpretation of Medicare to suggest that this case involves nothing more than an issue of whether the court of appeals misread Section 1395u(b)(3)(B). For the reasons set forth below, however, this case presents a fundamental issue relating to the proper application of the Supremacy Clause.

I. THE MEDICARE ACT PURPOSEFULLY GIVES PHYSICIANS THE OPTION TO BILL IN EXCESS OF THE "REASONABLE CHARGE"

Respondents base their Opposition on the argument (Opp. 7-8) that 42 U.S.C. § 1395u(b)(3)(B) does not really grant physicians the option to charge Medicare patients more than the "reasonable charge." They claim (Opp. 7) that this provision only "provides direction to the local carrier as to *methods* of payment." (emphasis added). In their view, it does not confer an option to charge more than the "reasonable charge." However, this view was expressly and correctly rejected by the court of appeals.

The option provided in 42 U.S.C. § 1395u(b)(3)(B)(i) is posed as an alternative to an option in which "the reasonable charge is the full charge for the service." 42 U.S.C. § 1395u(b)(3)(B)(ii). Consequently, the court below correctly observed that the "language in the Medicare Act itself . . . seems to presume the balance billing option." Pet. App. 6a. Moreover, the Court recognized that the principal architect of Medicare, Wilbur Mills, interpreted the Act "to allow doctors to bill over the reasonable charge" and that his interpretation is "an unusually authoritative one." *Id.* at 7a. Finally, it acknowledged that Congress in 1984 enacted a law, 42 U.S.C. § 1395u(h), which deliberately reaffirmed the option to bill more than the "reasonable charge." Pet. App. 7a-8a.

Thus, respondents are wrong in arguing that § 1395u(b)(3)(B) does not affirmatively and purposefully confer upon physicians a choice whether or not to charge patients more than the "reasonable charge." Indeed, the salient feature of § 1395u(b)(3)(B) is to permit charges in excess of the "reasonable charge." Any possible doubt on this point is eliminated by the Conference Report on the Deficit Reduction Act of 1984.

In explaining "Present law," that Report described the option in § 1395u(b)(3)(B) *solely* as signifying the physician's retention of the decision whether or not to accept the HHS-determined charge as full payment:

> "*Physicians may decide*, on a claim-by-claim basis, to accept assignment. That is, for each claim a physician may decide either (1) to accept the amount paid by Medicare (the reasonable charge) as payment in full (except for cost-sharing amounts) or, (2) *to bill the patient for the entire bill*, including any amount in excess of the Medicare *reasonable charge*. The patient is then responsible for paying the physician for the full amount of the bill and for submitting the claim to Medicare for payment of 80 percent of the Medicare reasonable charge." (emphasis added).

Conference Report No. 861, 98th Cong., 2d Sess., *reprinted in* 1984 *U.S. Code Cong. & Ad. News* 2004. In short, the major premise of respondents' Opposition—that the Medicare Act does not affirmatively confer upon physicians the option to bill more than the "reasonable charge"—is manifestly incorrect. This erroneous interpretation differs from that accepted by the court of appeals and destroys the underpinnings of respondents' attempt to analogize the option deliberately codified in § 1395u(b)(3)(B) to "any choice that Congress does not prohibit individuals from making." (Opp. 18).

II. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT INTERPRETING THE SUPREMACY CLAUSE

Unlike respondents, the court of appeals recognized that the option to bill more than the "reasonable charge" was purposefully and expressly provided in the Medicare Act. This option is not simply the incidental by-product of congressional indifference or inaction. Nonetheless, the court of appeals held that deliberate inclusion of this option as a basic feature of a federal program does not have

preemptive force because Congress did not use "the word 'right' or any other language suggesting creation of a right immune from state interference." Pet. App. 9a. It is this holding which directly conflicts with precedent of this Court and necessitates granting the petition.

Until this case, no appellate court had held that in order to protect from state nullification an option that Congress establishes to promote the objectives of a wholly federal program, Congress is required to use the word "right" or to make an express declaration of intent to preempt. To the contrary, an unbroken line of decisions of this Court recognizes that choices affirmatively created by Congress in the context of federally funded, federally administered programs are protected against state interference. *See Wissner* v. *Wissner*, 338 U.S. 655 (1950); Pet. 11 and cases cited therein.[1] In requiring additional evidence of preemptive intent in the form of a separate preemption clause or some mix of magic words, the court below deviates from those decisions. It mistakenly treats a congressional judgment in the context of an entirely federal program as unprotected from a state that thinks it knows better than Congress how the federal program should operate.

III. RESPONDENTS' OTHER ARGUMENTS PROVIDE NO REASON TO DENY THE PETITION

Respondents incorrectly seek to characterize the preemption claim here as assuming that Congress sought to guarantee "physicians freedom from state regulation"

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[1] Respondents assert (Opp. 19 n.10) that petitioners' theory is inconsistent with "at least five decisions of this Court" last Term which upheld state laws. What distinguishes this case and brings it within *Wissner* is that Congress purposefully granted physicians a choice as a crucial element of a nationally uniform program funded and administered by the federal government. In each of those cases Congress simply declined to prohibit certain conduct as a matter of federal law. In none of those cases did Congress purposefully create a choice in order to further federal purposes.

or "to preempt state regulation of physicians' fees." Opp. 8, 11. Petitioners make no such claim. Our only claim is that the Medicare Act preempts state laws which seek to impose the federally created reimbursement standard, the "reasonable charge," as a limitation on physicians' charges. Preemption is required because any such law undercuts the specific congressional judgment that the Medicare Act's "reasonable charge" standard not be used to limit physician charges to Medicare patients.[2]

Finally, respondents argue (Opp. 28-29) that the preemption issue raised in the petition should await further litigation. This argument is misguided for two reasons. First, the court of appeals' interpretation of the Supremacy Clause is an issue of national importance in two respects. It does violence to this Court's precedents and it directly undercuts a specific judgment about how best to serve the objectives of the Medicare program. Second, respondents do not suggest specifically what further litigation will accomplish. The record in this case is thorough. The legal issues have been fully aired by two separate courts in published opinions. The parties represent a wide array of relevant public interests. In sum, this case presents an ideal vehicle in which to decide both the broad preemption issues resolved by the court of appeals and the narrower issue of what Congress intended

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[2] As our petition points out, the decision below conflicts with decisions of other circuits insofar as it holds that a state may use the exact standard created by federal law to eliminate a congressional judgment. For example, in *Raskin* v. *Moran*, 684 F.2d 472 (7th Cir. 1982), the Seventh Circuit specifically condemned a state's effort to eliminate "exactly" the benefit created by Congress. Thus, the fact that Massachusetts has other laws which limit fees for patients who are not Medicare beneficiaries (Opp. 9-10) does not supply any basis for the state to deny "exactly" the option granted by Congress to advance the federal interest in ensuring that Medicare patients have unencumbered access to quality health care. Respondents fail to recognize the conflict in the approach taken by the Seventh Circuit in *Raskin* and the approach of the First Circuit here.

in Section 1395u(b)(3)(B). Accordingly, the Court should grant the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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